IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/06/2003

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE AR.RAMALINGAM

A.S.No.21 OF 1989

1.K.Velmurugan
2. Mrs.V.Rajabakkiyam ammal. ... Appellants.

-Vs-

1. R.Kannan (died)
2. Muthulakshmi Achi.
3. M.Sankar
4. M.Gunasekaran
5. Chandra
6. Gopikalyani
7. Kalaiselvi.
8. Mrs.Suriya
9. K.Rajendran
10.K.Saravanan
11.K.Bhuvaneswari
12.K.Kavitha
Respondents 8 to 12 are L.Rs. of the
deceased 1st respondent. ... Respondents.

Appeal filed against the decree and judgment dated 13.9.1988
in O. S.No.197 of 1985 on the file of the Sub Judge, Poonamallee.

!For appellants :: Mr.G.Anbumani for
M/s.Devadasan and Sagar &
S.Dharmakkan.

^For respondents :: Mr.R.N.Kothandaraman for R2 - 7
N.A. for R8 to 12.
:JUDGMENT

N.V.BALASUBRAMANIAN,J.

Defendants 2 and 3 are in appeal before us. They have filed
the appeal challenging the judgment and decree in O.S.No.197 of 1985 dated
13.9.1988 by the learned Subordinate Judge, Poonamallee in a suit for recovery
of money due on a mortgage. The plaintiffs are the legal representatives of
one Murugaiya Thevar, the mortgagee of the suit property.

2. According to the plaintiffs, the first defendant, R.Kannan had borrowed a sum of Rs.43,000/- from Murugaiya Thevar and executed a registered second mortgage deed dated 20.7.1978 in his favour agreeing to repay both principal and interest at the rate of 18% per annum on demand. The first defendant agreed to repay the amount with interest on or before 10th of every month and the default clause is also provided in the mortgage deed. In the deed it is provided that the mortgagee was empowered to recover the amount due under the mortgage after the loan under the first mortgage dated 23.1.1973 was discharged and a reconveyance deed was obtained thereof. The original mortgagee Murugaiya Thevar died on 14.5.1981 leaving behind the plaintiffs as his legal representatives.

3. According to the plaintiffs, the first defendant/ mortgagor has not paid to the original mortgagee either principal or interest during his lifetime, nor has he paid any amount after the demise of Murugaiya Thevar. According to the plaintiffs, on the date of institution of the suit, the first defendant was liable to pay a sum of Rs.43,000 /- towards principal and a sum of Rs.54,180/- towards interest totalling a sum of Rs.97,180/-. According to the plaintiffs, they are entitled to recover the money from the first defendant personally as well as by enforcing the suit mortgage.

4. It is also stated that subsequent to the second mortgage created in favour of Murugaiya Thevar, the first defendant discharged the first mortgage executed in favour of the State Bank of India Staff Cooperative House Construction Society, Chennai (hereinafter referred to as 'the SBI Co-operative Society') and got a reconveyance deed registered on 26.3.1984. It is stated that the first defendant sold the property in favour of the defendants 2 and 3 by a deed of sale dated 9 .4.1984 for valid consideration and the defendants 2 and 3 are also liable to pay the amount under the suit mortgage and the plaintiffs are entitled to recover the money from all the defendants who are jointly and severally liable to pay the suit amount. Hence, the suit has been instituted for recovery of the money due under the mortgage along with interest and costs.

5. The first defendant in his written statement raised several contentions, but it is not necessary to refer to all of them as the first defendant has not preferred any appeal against the judgment and decree granted against him by the learned Subordinate Judge, Poonamallee. His main defence was that there was no mortgage of the suit property in favour of Murugaiya Thevar and Murugaiya Thevar's son-in-law lent some money to a colleague of the first defendant and since the borrower did not pay the money, the son-in-law of Murugaiya Thevar compelled and coerced the first defendant to sign a stamp paper and hence, there was no mortgage on the suit property in favour of Murugaiya Thevar. However, the first defendant has not let in any evidence to substantiate his plea raised in the written statement and hence, it is not necessary to consider the defence raised by the first defendant in the appeal.

6. The defendants 2 and 3 who are appellants herein have raised a defence that the first defendant had no subsisting interest on the date of alleged mortgage deed as the first defendant had already conveyed the

suit property to the SBI Co-operative Society on 23.1.1973 and it is also stated that only subsequent to the suit mortgage, the said SBI Co-operative Society reconveyed the property to the first defendant on 26.3.1984 and on 9.4.1984 the first defendant sold the property to the defendants 2 and 3. One other contention raised was that the sale in favour of the appellants was free from encumbrance and there is no personal liability as against the appellants herein. The defendants 2 and 3 also referred to the suit notices exchanged between the parties. The other plea of the defendants 2 and 3 was that the cause of action said to have arisen on the basis of the alleged mortgage of the suit property which did not exist and hence, the claim made therein as against the defendants 2 and 3 is not maintainable.

7. The trial Court, on the basis of the above pleadings, framed necessary issues for consideration and after considering the evidence, both oral and documentary, passed a preliminary decree as prayed for. It is against the judgment and decree, the present appeal has been preferred.

8. Mr.G.Anbumani, learned counsel for the appellants submitted that before the date of the mortgage, viz., 20.7.1978 the first defendant had conveyed all his interests in the suit land in favour of the SBI Co-operative Society by virtue of a deed of sale dated 23.1.1973 and on the date of mortgage, the suit land was the property of a third party and therefore the first defendant had no interest to transfer by way of mortgage of the suit property in favour of Murugaiya Thevar. He also referred to the deed of reconveyance dated 26.3.1984 executed by the SBI Co-operative Society and submitted that only on 26.3.19 84 the first defendant became the owner of the property and from the first defendant, the appellants have purchased the property on 9.4.19 84. He also submitted that by the deed of reconveyance, the SBI Cooperative Society has not only conveyed the suit land, but also the building thereon and only thereafter, the first defendant became the owner of the suit property. His main submission is that the first defendant had no interest at all to mortgage the property in favour of Murugaiya Thevar on the date of the mortgage and hence, the mortgage in his favour was inoperative. The second submission of Mr.Anbumani, learned counsel is that even assuming that the first defendant mortgaged the property in favour of the SBI Co-operative Society by the deed dated 23.1.1973, the subsequent mortgage effected by him in favour of Murugaiya Thevar is null and void under the provisions of Section41 of the Tamil Nadu Co-operative Societies Act, 1983 (hereinafter referred to as 'the Co-operative Societies Act') and therefore, the plaintiffs are not entitled to file the suit on mortgage. The third submission of the learned counsel is that the appellants are subsequent transferees and they are not personally liable for the suit amount.

9. Mr.R.N.Kothandaraman, learned counsel for the respondents 2 to 7 /plaintiffs submitted that the deed dated 231.1973 executed by the first defendant in favour of the SBI Co-operative Society is really a deed creating a mortgage by conditional sale and there was no absolute sale of the suit property by the fist defendant in favour of the SBI Co-operative Society. His submission is that the property was mortgaged in favour of the SBI Co-operative Society as security for the loan advanced to the first defendant and therefore there was no outright sale and the mortgagor continued to be the

owner of the property when the second mortgage was created in favour of Murugaiya Thevar. Learned counsel also submitted that the appellants have not raised a plea that the second mortgage in favour of Murugaiya Thevar is invalid under the provisions of section 41 of the Co-operative Societies Act and therefore it is not open to the counsel for the appellants to raise such a plea before this Court. Learned counsel also submitted that even otherwise the Section 41 of the Co-operative Societies Act has no application as it applies only to Co-operative Society and its members and has no application to third parties. Learned counsel further submitted that since it is a suit for recovery of money due on a mortgage, the Court has granted decree in the form prescribed for passing of preliminary decree and the decree passed in conformity with the form prescribed in the Code of Civil Procedure cannot be regarded as illegal or invalid.

10. We have carefully considered the submissions of Mr.G.Anbumani, learned counsel for the appellants and Mr.R.N.Kothandaraman, learned counsel for the respondents/ plaintiffs. The points that arise for consideration are as under:
1. Whether the deed dated 23.1.1973 executed by the first defendant in favour of the SBI Co-operative Society is a document conveying absolute right of the first defendant in favour of the said Cooperative Society or it is only a deed of mortgage by conditional sale?

2. Whether the deed of mortgage dated 20.7.1978 is regarded as null and void by virtue of the provisions of section 41 of the Cooperative Societies Act?

3. Whether the appellants/defendants 2 and 3 are personally liable to pay the amount decreed by the trial Court?

11. POINT NO.1:- In order to appreciate the point No.1, it is necessary to mention that the first defendant, R.Kannan was the absolute owner of the suit property, both the land and the building thereon. He purchased the suit land on 30.8.1972 and it is stated that he was in possession and enjoyment of the land. H e became a member of the SBI Co-operative Society on 11.6.1966 and approached the SBI Cooperative Society for the sanction of loan to put up a construction on the suit land. In the deed dated 23.1.1973 (Ex.B-1) it is stated that under the rules and regulations governing the SBI Co-operative Society it was necessary that the property should be transferred to the Cooperative Society before the loan was granted. As the first defendant had applied for a loan for a sum of Rs.27,500/- for the purpose of construction of a residential house and the loan was also sanctioned, the transaction was entered into. The first defendant had transferred the suit land in favour of the SBI Co-operative Society. The deed contains the usual covenants which are normally found in a deed of sale. There is a relevant clause which is important to decide the question that arises in the appeal and that clause is one which provides for reconveyance of the property on the discharge of the liability under the mortgage to the SBI Co-operative Society and the said clause reads as under:-
"Provided always that if the vendor repays the loan to the Society and duly fulfils his obligations as per the Schemes of Repayment of

the loan to the Society thereon such repayment of the loan to the Society retransfers the Schedule Property to the Vendor."

12. The expression, 'sale' is defined in section 54 of the Transfer of Property Act,1882 to mean a transfer of ownership in exchange for a price paid or promised or part-paid or part-promised. The relevant provision dealing with a mortgage by conditional sale is section 58 (c) of the Transfer of Property Act and the expression, 'mortgage by conditional sale' is defined in that section as under:-

" Mortgage by conditional sale - Where, the mortgagor ostensibly sells the mortgage property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

13. Admittedly, the condition that on repayment of the mortgage loan to the SBI Co-operative Society by the first defendant, the Cooperative Society shall transfer the property back to the defendant is embodied in the deed itself and the clause indicates that though the deed purports to effect a sale of the suit property, it is a mortgage by conditional sale. When a document could be regarded as a deed of sale or when it could be regarded as a mortgage by conditional sale has been the subject matter of consideration by the Supreme Court as well as by this Court. The Supreme Court in CHUNCHUN JHA v. EBADAT ALI (AIR 1954 SC 345) has held that the question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition to repurchase is a vexed one and must be decided on its own facts and in such cases the intention of the parties is the determining factor. The Supreme Court has laid down the following tests to determine the question whether a transaction is a mortgage by conditional sale or an absolute sale:-

" The first is that the intention of the parties is the determining factor: see - "Balkrishen Das v. Lagge" 22 Ind. App.58 (P.C.) (A). But there is nothing special about that in this class of cases and here, as in every other cases, where a document had to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If however, there is ambiguity in the language employed, then it is permissible to look into the surrounding circumstances to determine what was intended.

As Lord Cranworth said in -Alderson v. White, (1858) 44 E.R.924 at p. 928 (B) -

'The rule of law on this subject is one dictated by common sense; that 'prima facie' so absolute conveyance, containing nothing to show that the relation of

debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase ... ... In every such case the question is, what upon a fair construction, is the meaning of the instruments'?
Their Lordships of the Privy Council applied this rule to India in --'Bhagwan Sahai v. Bhagwan Din' 17 Ind.App.98 at p.102 (P.C.) (C) and in ... Uhanda Singh v. Wahid -ud-din, AIR 1916 P.C. 49 at p. 54 (D)."

The Supreme Court considered the said question in number of other cases, namely, BHASKAR v. SHRINARAYAN (AIR 1960 SC 301), SIMRATHMULL v. NANJALINGIAH (AIR 1963 SC 1182), TAMBOLI RAMANLAL MOTILAL v. GHANCHI CHIMANLAL KESHAVLAL (AIR 1992 SC 1236), VIDHYADHAR v. MANIKRAO (1999) 3 SCC 573) and MUSHIR MOHAMMED KHAN v. SAJ EDA BANO (2000) 3 SCC 536).

14. This Court in NATESA PATHAR v. PAKKIRISAMY PATHAR (AIR 1997 Madras 105) considered a similar question and after considering the earlier case-laws, Doraiswami Raju,J. (as His Lordship then was) held as under:-
" The document in question was executed as a sale for a sum of Rs.250/-. The very same document contained a condition and recital that on the seller repaying the said sum of Rs.250/- within five year, a resale shall be executed by the purchaser to the seller. The conspicuous and important stipulation which was decisive of character of the document, that within the said give years period, the purchaser would not encumber the property in any manner was found specifically engrafted in the document. The further recital and condition of the transaction was that if only within the said stipulated time, the sale amount was not repaid and the resale obtained thereafter, the sale would become confirmed in favour of the purchaser. The consideration of Rs.250/- was recited as having been already received. The possession of the property had been handed over on the date of the execution of the sale. The undertaking to clear the encumbrances if any, was found stipulated after the stipulation in the document that the sale would get confirmed, if within five years the amount was not repaid and resale obtained. There was clear evidence to show that on the date of execution the property was worth Rs.2,000/- as against the consideration of Rs.250/- for the document.
Held that the document in question was only a mortgage by conditional sale and not a sale with a condition for retransfer."

15. A Full Bench of the Gujarat High Court in KANTILAL M.KADIA v. SOMABHAI DAHYABHAI KADIA (2003) 6 ILD (GUJ.) (FB) 149) laid down the following tests to determine the question when a document could be regarded as a deed of sale or a mortgage by conditional sale:-
" (i) The proviso to clause (c) of section 58 was added by Act 20 of 1929 so as to set at rest the conflict of decisions on the question whether the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed purporting to be a transaction of sale. The legislature enacted that a transaction shall not be deemed to be a mortgage by conditional sale unless the condition for reconveyance is contained in the document which purports to effect the sale.

(ii) But merely because the condition for reconveyance is incorporated in the same document purporting to be a sale, it does not necessarily mean that a mortgage transaction was intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention to be gathered from the language of the deed interpreted in light of the surrounding circumstances. Of course, the condition has to be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction.
(iii) The form in which the deed is clothed is not decisive, because the definition of a mortgage by conditional sale by itself contemplates an ostensible sale of the property.
(iv) The mortgage by conditional sale postulates the creation by the transfer of a relationship of mortgagor and mortgagee, the price being charged on the property conveyed. In a conditional sale, there is no relationship of debtor and creditor, nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. Hence, what distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt.
(v) If the language is plain and unambiguous it must in light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. The oral evidence of intention is not admissible in interpreting the covenants of the deed, but the evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may be given. The evidence of contemporaneous conduct is always admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.
(vi) Once, a transaction is embodied in one document and not two and once its terms are governed by section 58(c), then it must be taken to be a mortgage by conditional sale, unless there are express words to indicate the contrary, or in a case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion. The question in such case is not whether the words purport to make the transferee an absolute proprietor, for course they may under section 58(c), but whether that is done only ostensibly and not in substance."

16. Applying the law laid down by the Supreme Court as well as by this Court and the Full Bench of the Gujarat High Court, a careful reading of the document dated 23.1.1973 shows that the said deed is only a deed of mortgage by conditional sale. Though the document was in the form of a deed of sale, there is a stipulation incorporated in the deed that the SBI Co-operative Society should reconvey the property on repayment of loan by the mortgagor and on fulfilment of the obligations created under the deed by him.

17. The second circumstance is that the first defendant became a member of the SBI Co-operative Society and he approached the SBI Cooperative Society only to avail a loan for putting up superstructure on the

suit land and under the rules and regulations governing the Society, it was incumbent that the property should be transferred to the SBI Co-operative Society before the loan was sanctioned or granted and it was to comply with that regulation, the property was transferred. The third circumstance is that the property was transferred for value of the loan amount sanctioned and it was not transferred for the value of the property. The fourth circumstance is that the first defendant not only continued to be in possession of the suit property, but he was also in enjoyment of the same by putting up further construction on the suit land. If the suit site had been actually sold to the SBI Co-operative Society, the Co-operative Society would not have permitted the vendor of the property to put up construction on the suit site belonging to it. It is a clinching factor to determine the question regarding nature of the transaction. The fifth circumstance is that the SBI Co-operative Society has not taken any steps for the transfer of patta or for mutation of name in its favour in the Revenue records and the first defendant continued to be in possession and enjoyment of the suit property.

18. The next circumstance is that by the deed of reconveyance dated 26.3.1984 the property was reconveyed acknowledging the receipt of all the amount due to the SBI Co-operative Society, namely, the loan amount sanctioned by the SBI Co-operative Society to the first defendant and it was not retransferred for the value of the suit property. There is also evidence to the effect that during the subsistence of the transaction between the first defendant and the SBI Co-operative Society, the appellants have entered into an agreement of sale to purchase the property which clearly shows that the appellants have understood that the transaction between the first defendant and the SBI Co-operative Society was only a mortgage by conditional sale.

19. Further, we have seen that the condition regarding the reconveyance has been incorporated in the same deed and once the condition has been incorporated in the said document and the terms of the document are covered by the provisions of section 58(c) of the Transfer of Property Act, it is for the person who asserts that it is not a mortgage by conditional sale to prove either from the document itself and other attendant circumstances that the transaction was an outright sale. The appellants have not discharged the burden cast on them and there are no surrounding circumstances to establish that it was a transaction of outright sale. A reading of the document clearly shows that the parties, by transfer of the property, created the relationship of mortgagor-mortgagee and there was only the relationship of debtor and creditor between the first defendant and the SBI Co-operative Society and the transfer of the suit land was made only as a security for the debt borrowed by the first defendant from the SBI Cooperative Society.

20. It is well settled that the nomenclature given to the document or the form in which it is couched is not conclusive as in the case of mortgage by conditional sale there would be an ostensible sale of property, and what is relevant is the intention of the parties. The intention has to be gathered from the document and other attendant circumstances and we are of the view, by the document dated 23.1.1973 there existed the relationship of debtor and creditor between the first defendant and the SBI Co-operative Society and the property was ostensibly transferred in favour of the Co-operative Society

as a security for the loan availed by the first defendant. In this view of the matter, we hold that the first defendant, by the document dated 23.1.1973, has created a mortgage by conditional sale and he was not stripped of his rights over the suit property by the execution of the mortgage by conditional sale in favour of the SBI Co-operative Society. Hence, we hold that the second mortgage executed by the first defendant in favour of Murugaiya Thevar is perfectly valid as it is supported by consideration and the first defendant had subsisting interest over the suit property as an owner of the property on the date of suit mortgage. Accordingly, we answer the first question holding that the document dated 23.1.1973 is only a mortgage by conditional sale and not a deed of absolute sale.

21. The second point is whether the second mortgage is null and void in view of the provisions of section 41 of the Co-operative Societies Act. Section 41 of the Co-operative Societies Act reads as under:

" Charge of immovable property of members borrowing loans from certain registered societies. -- Notwithstanding anything contained in this Act or in any other law for the time being in force --

(i) a member who makes an application for a loan to a registered Society other than a land development bank of which the majority of the members are agriculturists, shall, if he owns land, or other immovable property, make a declaration in the form prescribed, if any, that he thereby creates a charge upon such land or other immovable property or such portion thereof as may be specified in the declaration, in respect of the loan, which the society may make to the member on the application and future loans, if any, together with interest on such loan or loans;

(ii) a declaration made under clause (i) may be varied or cancelled at any time by the member with the previous written permission of the Society in favour of which such charge has been created;

(iii) no land or other immovable property in respect of which declaration under clause (i) has been made and no part of, nor any interest in, such land or immovable property shall without the consent of the Society, be sold or otherwise transferred until the said declaration is cancelled; and any transaction made in contravention of this clause shall be null and void: Provided that it shall be lawful to a member to mortgage such land or other immovable property or any part thereof in favour of a land development bank.

(iv) the declaration made under clause (i) or any variation or cancellation thereof under clause (ii) shall be sent by registered post by the society to the Sub-Registrar having jurisdiction over the area in which the land or the other immovable property is situated;

(v) on receipt of the declaration or variation or cancellation, the Sub-Registrar shall register such declaration or variation or cancellation and issue a copy thereof to the registered society;

(vi) any declaration made under clause (i) or any variation or cancellation thereof under clause (ii), which has not been registered under clause (v) shall be null and void;

(vii) the declaration and the variation, if any, upon registration under clause (v) shall be deemed to create an interest in the property to which the declaration relates and shall constitute notice to every person dealing with the said property."

22. We find force in the submission of Mr.Kothandaraman, learned counsel for the respondents that the appellants have not raised the plea regarding the applicability of the provisions of section 41 of the Co-operative Societies Act in the written statement filed by them. The plea regarding invalidity of the deed of mortgage was raised in the light of the plea that there was an absolute sale by the first defendant in favour of the SBI Co-operative Society by the deed dated 23.1.1973 and not on the ground of the applicability of section 41 of the Co-operative Societies Act. Even assuming that the counsel for the appellants is entitled to raise the plea regarding applicability of section 41 of the Co-operative Societies Act for the first time in the appeal, we find that the pre-requisite condition to be fulfilled for the applicability of section 41 is that a declaration in the Form prescribed under the Co-operative Societies Act and the Tamil Nadu Co-operative Societies Rules,1988 should be filed at the time of creation of a charge over the property. Under section 41 of the Cooperative Societies Act, the declaration should be sent by registered post to the Sub-Registrar of Co-operative Societies and the Sub-Registrar should register the declaration or variation or cancellation of the declaration. He is also empowered to issue a copy to the registered society. Clause (vi) of section 41 provides that if the declaration has not been registered, the declaration made shall be null and void. The appellants have not established by evidence that the first defendant has made any such declaration in the Form prescribed under the Co-operative Societies Act and the Co-operative Societies Rules and in the absence of any evidence to show that any such declaration was made which was registered by the Sub-Registrar of Co-operative Societies, we hold that it is impermissible for the counsel for the appellants to raise the plea that the second mortgage in favour of Murugaiya Thevar is null and void. Hence, it is unnecessary to decide the other question raised by Mr.Kothandaraman that the provisions of section 41 of the Co-operative Societies Act have no application to third parties.

23. One other contention raised by the learned counsel for the appellants is that they are bona fide purchasers for value and they have purchased the property without the knowledge of the second mortgage created by the first defendant in favour of Murugaiya Thevar. Learned counsel referred to the encumbrance certificate dated 27.3.1984 (Ex.B-3) wherein there is no reference to the second mortgage dated 20.7.1978 created by the first defendant in favour of Murugaiya Thevar, though the search was made for a period of 13 years from 1.1.1972 to 23 .3.1984. The certificate clearly shows that under section 57 of the Registration Act and Rule 137(i) of the Registration Rules, it is open to the applicant to make search and inspect documents, but the applicant has not personally conducted the search and the search was made by the Registration officials. The Sub-Registrar clarified in the certificate that the registration department would not be responsible for any error in the results of the search embodied in the certificate. Hence, it is not open to the appellants to rely upon the encumbrance certificate, Ex.B-3 to contend that they are bona fide purchasers of the property without noticing the second mortgage.

24. Another significant matter is that the appellants/defendants 2 and 3 are the close relatives of the first defendant

and the evidence of the second defendant shows that he was aware of the second mortgage executed by the first defendant in favour of Murugaiya Thevar, as his evidence was that the first defendant informed him that he has no connection with the second mortgage executed by him. The answer given by him in his chief-examination implies that the first defendant informed the second defendant about the second mortgage executed by the first defendant in favour of Murugaiya Thevar, but it was stated that he has no connection with the same. Further, it is a suit on mortgage and the mere fact that the subsequent purchasers are bona fide purchasers for value is not a ground to hold that the mortgagees are not entitled to proceed against the property mortgaged in their favour to realise the mortgage debt. Hence, the second point is also answered against the appellants.

25. As far as the third point is concerned, there is no difficulty in holding that the appellants, who are purchasers of the equity of redemption, are not personally liable as held by the Judicial Committee in Jamna Das v. Ram Autar (1912) 34 All. 63: 21 MLJ 1158). It is also not a case falling under section 55(5)(d) of the Transfer of Property Act, as the property was not sold subject to the earlier mortgage. It is well established that no personal decree can be granted against a subsequent transferee of the property from the mortgagor. Needless to say that the personal decree provided in Order 34 Rule 6 C.P.C. would operate only when the sale proceeds of the mortgaged property is found to be insufficient to discharge the mortgage debt and as far as the decree drafted in this case is concerned, the decree has been drawn in accordance with Form No.11 in App.D in compliance with the provisions of Order 34, Rule 4 C.P.C., but however, the personal decree granted against the appellants in the decree is not enforceable as the appellants are only subsequent purchasers.

26. Consequently, we do not find any reason to interfere with the judgment and decree of the trial Court except to the extent earlier indicated. Consequently, the appeal fails and the same is dismissed. However, in the circumstances of the case, there will be no order as to costs.

Index:Yes
Website:Yes
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